(1)

Supreme Court, U.S.
FILED

No. 05 243 AUG 19 2005

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals and the district court have unconstitutionally denied Petitioner his constitutional rights to due process of law and equal protection of the law by failing to grant appellate review and collateral review of Petitioner's claim that his conviction had been obtained in violation of his Sixth Amendment right to have counsel of his choice to present his defense?

2. Whether the district court's ruling and the appeal court's ruling the Petitioner had failed to make a substantial showing of the denial of a constitutional right are inconsistant with the standards to be applied in reviewing an application for a certificate of appealability pronounced by this Court in **Slack v. McDaniel**, 523 U.S. 423, 146 L.Ed.2d 542, (2002), and **Miller-El v. Cockrell**, 537 U.S. 322, 154 L.Ed.2d 931 (2003)?

INTERESTED PARTIES

There are no other parties than those named in the caption on the cover page of this petition who have any type of interest in the outcome of this case.

TABLE OF CONTENTS

Page

Questions Presented.....i

Interested Parties.....ii

Table of Contents.....iii

Judgment Below.....vi

Table of Authorities.....vii

Proof of Service.....x

Judgment and Opinion Below.....1

Jurisdictional Statement.....2

Constitutional and Statutory Provisions Involved.....3

Statement of the Case.....4

Reasons For Granting Certiorari.....11

1. The Eleventh Circuit Court of Appeals and the district court have denied Allen his constitutional rights to due process and equal protection of the law by failing to grant appellate and collateral review of Allen's claim that his conviction was obtained in violation of his Sixth Amendment right to choice of counsel to present his defense.....11

Page

2. The district's court's ruling and appeal court's ruling that Allen had failed to make a substantial showing of the denial of a constitutional right are inconsistant with the standards to be applied in reviewing applications for certificates of appealability pronounced by this Court in **Slack v. McDaniel**, 529 U.S. 523, (2002) and **Miller-El v. Cockrell**, 537 U.S. 322, (2003).....23

Conclusion.....26

Appendices:

A. Unpublished Opinion of the United States Court of Appeals for the Eleventh Circuit rendered and entered on November 26, 2002.....Appx. 1

B. Order of dismissal entered by the United States District Court for the Middle District of Florida on October 20, 2004.....Appx. 15

C. Order of the United States District Court for the Middle District of Florida denying COA dated January 12, 2005.....Appx. 25

Page

D. Order entered by Circuit Court Judge Joel F. Dubina of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appealabilty on March 11, 2005.....Appx. 26

E. Order entered by Circuit Court Judges Dubina and Tjoflat of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appeal-ability on April 21, 2005.....Appx. 27

JUDGMENT BELOW

The judgment entered by the United States Court of Appeal for the Eleventh Circuit at Docket Number 05-10222-G, is attached as Appendix **E** to this petition.

TABLE OF AUTHORITIES

Cases cited **Page**

Bonner v. City of Prichard, Alabama
661 F.2d 1206 (11th Cir. 1981).....17

Brown v. United States,
156 L.Ed.2d 847 (2003) (table)....16, 17

Dorman v. Wainwright,
798 F.2d 1358 (11th Cir. 1986)....20, 21

Ex Parte Royall, 117 U.S. 286,
22 L.Ed. 868 (1886).....24

Faretta v. California, 422 U.S. 806
45 L.Ed.2d 562 (1975).....20

Flanagan v. United States, 565 U.S.
259, 79 L.Ed.2d 288 (1984)....14, 20, 22

Hardin v. Wainwright,
678 F.2d 589 (5th Cir. 1982).....18

Hohn v. United States, 524 U.S. 236,
141 L.Ed.2d 242 (1998).....2

Linton v. Perini,
656 F.2d 207 (6th Cir. 1981).....12

Matthews v. DeCastro, 429 U.S. 286,
22 L.Ed. 281 (1969).....24

Miller-El v. Cockrell, 537 U.S. 322,
154 L.Ed.2d 931 (2003).....23, 24

Neder v. United States, 527 U.S. 1,
144 L.Ed.2d 35 (1999).....22

Nettles v. Wainwright,
677 F.2d 404 (5th Cir. 1982).....18

Powell v. Alabama, 287 U.S. 45,
77 L.Ed. 158 (1932).....12

Rose v. Lundy, 455 U.S. 509,
71 L.Ed.2d 379 (1982).....24

Page

Slack v. McDaniel, 529 U.S. 423, 146 L.Ed.2d 542 (2002).....23

Thomas v. Arn, 474 U.S. 140, 88 L.Ed.2d 435 (1985)..... 18, 19

United States v. Brown, 299 F.3d 1252 (11th Cir. 2002)....15, 17

United States v. Garcia, 517 F.2d 272 (5th Cir. 1977).....21

United States v. Koblitz, 803 F.3d 1525 (11th Cir. 1986).....12

United States v. Renfro, 620 F.2d 497 (5th Cir. 1980).10,14,15,16,17,18,19

United States v. Warren, 687 F.2d 347 (11th Cir. 1982).....10, 17, 18, 19

STATUTES AND RULES CITED

21 U.S.C. § 841(a)(1).....4, 5

21 U.S.C. § 841(b)(1)(A).....5

21 U.S.C. § 846.....4, 5

28 U.S.C. § 1254(1).....2

28 U.S.C. § 1291.....2, 14, 16

28 U.S.C. § 2253.....2

28 U.S.C. § 2255.....2, 7, 8, 21

Federal Rule of Appellate Procedure 40.....9

Federal Rule of Criminal Procedure 52(b).....16

Eleventh Circuit Local Rules 27-1(b), 27-1(g), and 27-2.....9

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

Due process clause of the Fifth Amendment.....3, 10, 11, 15, 19, 25

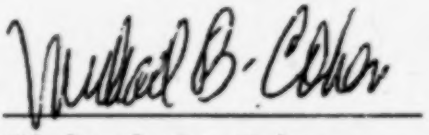
Equal protection of the Fourteenth Amendment incorporated into the due process clause of the Fifth Amendment 3, 10, 11, 15, 19, 25

Right to choice of counsel under the Sixth Amendment.....
.....3, 7, 11, 12, 15, 20, 22

Statutory right to a criminal appeal, ...3, 11, 22, 25

PROOF OF SERVICE

The undersigned certifies that he has complied with Supreme Court Rule 29(4) by causing an exact copy of this petition for writ of certiorari to be delivered to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001, by depositing a copy of same into a U.S. Postal Mail Box located inside of the United States Postal Office at Lake and LaSalle Streets Chicago, Illinois on August 19, 2005, to be delivered as first-class mail.

By: 

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PETITION FOR WRIT OF CERTIORARI

Terry Allen, hereinafter referred to herein as "Allen," petitions the Supreme Court of the United States to review the decision of the United States Court of Appeals for the Eleventh Circuit decided on April 21, 2005, in Case No. 05-10222, that is directly related to a decision entered by the Eleventh Circuit Court of Appeals on November 26. 2002, in Case No. 02-11918, entitled United States v. Terry Wayne Allen.

JUDGMENT AND OPINION BELOW

The order of the United States Court of Appeals for the Eleventh Circuit is set out in the Appendix at E. This order has a relationship to a prior unpublished decision by the Eleventh Circuit Court of Appeals that is set out in the Appendix at A.

JURISDICTIONAL STATEMENT

Petitioner invoked the jurisdiction of the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 2255. The jurisdiction of the United States Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), and the holding set forth in **Hohn v. United States**, 524 U.S. 236, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right under the Fifth Amendment to the U.S. Constitution to Due Process of law:

The right to equal protection under the law provided by the Fourteenth Amendment to the U.S. Constitution which is incorporated into the Due Process Clause of the Fifth Amendment to the U.S. Constitution;

The right to counsel of choice of a criminal defendant under the Sixth Amendment to the U.S. Constitution for those criminal defendants who can afford to reprivate counsel; and,

The statutory right under 28 U.S.C. § 1291 of every federal criminal defendant to appeal his conviction.

STATEMENT OF THE CASE

On July 19, 2000, a federal grand jury in the Middle District of Florida, Ocala Division, indicted Terry Allen, charging him with conspiring from about 1989 to about August 29, 1995, in Lake County, Florida, and elsewhere, to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841 (a)(1) and 846. The indictment included a forefeiture provision by which Allen was notified, the government intended to forfeit all property constituting and derived directly or indirectly from proceeds of the conspiracy and property used or intended to be used to facilitate the comission of the conspiracy. R-1.[1].

Attorney, Clyde M. Taylor, Jr., filed a notice of appearance on behalf of Allen, and moved the district court to dismiss the indictment on grounds that the conspiracy had already ended in July of 1995. R-12. The district

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1. "R" references refer to entries on the docket sheet in Case No. 5:00-Cr-Oc-28-KRS (M.D. Fla. 2000).

court denied the motion, because the end date of the conspiracy is a matter of proof to be decided at trial. R-37. On January 17, 2001, a grand jury returned a superseding indictment which charged Allen with conspiring from about 1989 to about August 29, 1998, in Lake County, Florida, and elsewhere, to distribute 1000 kilograms or more, of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vii), 846. R-37.

Shortly thereafter, Allen retained attorney, Harrison Slaughter, to serve as trial counsel. R-47. However, the government moved to disqualify him from representing Allen on grounds that he was a potential witness for the defense as to a statement a government witness purportedly overheard Allen make in his presence. R-56. After an evidentiary hearing, R-79, a magistrate judge, granted the government's motion disqualifying Harrison Slaughter as Allen's attorney. R.86. Allen then retained attorney A. Brian Phillips to serve as trial counsel. However, Phillips failed to appeal the magistrate's disqualification order to the district court judge.

Jury selection began on November 5, 2001, and the trial went on thru November 6-9, with the jury returning a verdict of guilty on November 9, 2001. R-120. The trial reconvened four-days later for the forefeiture hearing which resulted in the jury returning a forefeitute verdict for the government on November 13, 2001. R-123.

Following trial, Allen was remanded into custody and trial counsel filed a motion for judgment of acquittal or in the alternative for a new trial. R-130. Trial counsel also filed several other motions not relevant for appeal purposes. The district court denied Allen's motion for judgment of acquittal, and/or, for a new trial on March 27, 2002. R-151. And on March 29, 2002, sentenced Allen to a 240-month term of imprisonment. R-153.

On April 3, 2002, a notice of appeal was filed. Thereafter, a number of other issues relating to the forefeiture issue, and claims by Allen's wife took place in the district court. R-157-162, 164 and 171-172. Subsequently, Allen's conviction was affirmed by the Eleventh Circuit in an unpublished written opinion. (See Appendix A).

However, the opinion shows that the Eleventh Circuit held it did not possess appellate jurisdiction to review Allen's claim that his conviction was obtained in violation of his Sixth Amendment right to choice of counsel, because Allen failed to appeal the magistrate's disqualification order to the district court judge. (See Appendix A at Appx. 6-7).

On November 7, 2003, Allen retained new counsel, who filed a motion pursuant to 28 U.S.C. § 2255, to vacate Allen's conviction and sentence. Dkt-1. [2.] The motion alleged, inter alia, that Allen had been denied his Sixth Amendment right to effective assistance of counsel based upon counsel failing to appeal the magistrate's order disqualifying his attorney, Harrison Slaughter, to the district court judge. And also alleged that this failure caused Allen to be deprived of his right to have the Eleventh Circuit adjudicate his claim that his conviction had been obtained in violation of his right under the Sixth Amendment to choice of counsel.

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2. "Dkt" references refer to entries on the docket sheet in the §2255 habeas case.

The district court entered an order striking Allen's counseled memorandum of law, because, counsel failed to include a certficate of service. But also granted counsel 15 days within which to refile the memorandum with the appropriate certificate of service. Dkt-7.

On December 29, 2003, Allen moved without counsel for leave to file an amended § 2255 motion causing counsel to seek leave to withdraw. Dkt. 13-14. The district court after considering several matters granted counsel leave to withdraw and also granted Allen leave to proceed pro se and file an amended 2255 motion. Dkt-13-14.

Subsequently, on November 20, 2004, the district court denied Allen's motion for habeas relief brought pursuant to 28 U.S.C. § 2255. Dkt-37 (See Appendix B). A timely notice of appeal was filed along with a jurisdictional statement. Allen also simultaneouly filed an application for a certficate of appealability ("COA") in the district court. Dkt-41-42-43. On January 12, 2005, the district court denied Allen's application for a COA on

the grounds that Allen had failed to make a showing of the deprivation of a constitutional right, even though, the district court judge's order shows it was filed on January 10, 2005. (See Appendix C).

Allen then filed a supplemental submission for a COA in the United States Court of Appeal for the Eleventh Circuit under local Eleventh Circuit Rule 22-1(b). Hovever, on March 11, 2005, Circuit Judge Joel F. Dubina, entered a one-judge order denying Allen's application for a COA. (See Appendix D).

Allen then filed a motion pursuant to local Eleventh Circuit Rules 27-1(g) and 27-2, asking that a three-judge panel review Judge Dubina's one-judge order. On April 21, 2005, a two-judge order entered by Circuit Court Judges Dubina and Tjoflat denied Allen's motion for a three judge panel after construing the motion as a motion for reconsideration. (See Appendix at E).

Allen then filed a Rule 40 petition for rehearing with en banc suggestion on the grounds that an intra circuit conflict between the Eleventh Circuit's

holdings in **United States v. Renfro**, 620 F.2d 497 (5th Cir. 1980) and **United States v. Warren**, 687 F.2d 347 (11th Cir. 1982) had caused the Eleventh Circuit Court of Appeals to deny Allen his constitutional rights to due process and equal protection of the law. However, the Office of Clerk for the Court of Appeals for the Eleventh Circuit returned the petition to Allen unfiled. Then on July 13, 2005, Justice Kennedy granted an extension of time until August 19, 2005, within which to file the instant petition for writ of certiorari.

REASONS FOR GRANTING CERTIORARI

1.

The court of appeals and the district court have unconstitutionally denied Allen his constitutional rights to due process of law and equal protection of the law by failing to grant appellate review and collateral review of Allen's claim that his conviction was obtained in violation of his Sixth Amendment right to have counsel of his choice to present his defense.

A. The Eleventh Circuit Court of Appeals incorrectly ruled it did not have appellate jurisdiction to review Allen's claim that the magistrate judge had committed reversible error when he entered an order disqualifying Allen's retained choice of counsel, Harrison Slaughter.

The Sixth Amendment guarantees every criminal defendant the right "to have the assistance of counsel for his defense." U. S. Constitution, Amendment VI. Without such a right, this Court has recognized in an often quoted passage, even the most

gifted of laymen might be wrongfully convicted because:

> "[An accused] lacks both the skill and the knowledge to adequately prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158 (1932). It is also well-established that a component of this right is the protection of a defendant's opportunity to obtain counsel of his choice to present his defense:

> "The right to choose one's own counsel is an essential component of the Sixth Amendment because were a defendant not provided the opportunity to select his own attorney at his own expense, substantial risk would arise that the basic trust between counsel and client, which is the cornerstone of the adversary system, would be undercut."

United States v. Koblitz, 803 F.2d 1525 (11th Cir. 1986), citing **Linton v. Perini**, 656 F.2d 207 (6th Cir. 1981). And, even though, it is true that a defendant has a constitutionally based right to choice of

counsel, it is also true that the right is not absolute, because, "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer he prefers...." **Wheat v. United States**, 486 U.S. 153, 100 L.Ed.2d 140, (1988). Moreover, in **Wheat**, this Court acknowledged:

> "Unfortunately for all concerned, a district court must pass on the issue of whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass darkly.....it is the rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each government witness will say of the stand."

Id. **Wheat**, 100 L.Ed.2d at 151. However, in **Wheat**, this Court also noted that:

> "The government may seek to "manufacture" a conflict in order to prevent a defendant from having a particularly able counsel at his side; but trial courts are undoubtedly aware of this possibilty, and must take it in-

> to consideration along with all of the other factors which inform this sort of decision."

Id. **Wheat**, 100 L.Ed.2d at 151. And in **Flanagan v. United States**, 565 U.S. 259, this Court held that a trial court's pre-trial disqualification order of defense counsel was not immediately appealable under 28 U.S.C. § 1291, and therefore, a defendant must wait until a final judgment has been entered before a defendant can appeal a trial court's decision to disqualify defense counsel. Id. 79 L.Ed. 2d 288 (1984).

Accordingly, Allen's major claim in his direct appeal was that the magistrate judge had committed reversible error by disqualifying his attorney, because, the government had manufactured the potential conflict of interest to cause his counsel to be disqualified. Nevertheless, even though, this Court held in **Flanagan**, that a final judgment must be entered before a defendant can appeal a trial court's decision to disqualify defense counsel, the Eleventh Circuit held:

> "This case is indistinguishable from **Renfro**. Similar to Renfro, Allen first challenged the magistrate's order disqualifying his retained counsel in a post-trial motion. Also

> similar to the evidentiary motion at issue in **Renfro**, the motion to diqualify Allen's retained counsel was a pretrial motion, the adjudication of which was necessary to proceed to trial. Thus, Allen's delay in appealing the magistrate's ruling deprived the trial judge of his ability to effectively review the magistrate's holding. By analogy to this Court's holding in **Renfro**, Allen is now appealing the magistrate's decision directly to this Court, and, accordingly, we must dismiss this portion of Allen's appeal for lack of jurisdiction."

(See Appendix A at Appx. 6-7). Allen submits the following reasons to support his claim that the Eleventh Circuit Court of Appeals unconstitutionally denied Allen due process and equal protection of the law based upon the panel failing to adjudicate his Sixth Amendment claim that his conviction had been obtained in violation of his right to choice of counsel to present his defense.

First, the panel's decision dismissing a portion of Allen's appeal, also relied upon **United States v. Brown**, 299 F.3d 1252, 1260 (11th Cir. 2002). (See Appx. A at Appx. 8-9). This Court granted certiorari to review the Eleventh Circuit's decision in **Brown**, at U.S. No. 02-8263. The Solicitor Attorney General in responding to **Brown's** petition stated in the government's brief:

> "[T]he government agrees with the petitioner that the Eleventh Circuit's conclusion that it lacked jurisdiction is incorrect. The court of appeals explained that it lacked jurisdiction " '[a]ppeals from the magistrate's ruling must be to the district court' ". (quoting **Renfro**, 620 F.2d at 500). The appeal in this case, however, was not taken directly from the magistrate judge's order. Rather, Petitioner appealed from the final judgment of conviction entered by the district court in her case. See Pet. App.42 ("[Petitioner appeals her convictions'). The court of appeals had jurisdiction of that appeal pursuant to 28 U.S.C. 1291 (courts of appeals have jurisdiction of appeals from "all final decisions of the district courts").....Once the court of appeals has jurisdiction, Federal Rule of Criminal Procedure 52 (b) prescribes the standard for review of a claim that was not presented to the district court. That rule provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention...."

(Brief of the United States in **Brown v. United States**, U.S. No. 02-8263 at pages, 10-11). Consequently, this Court entered a GVR order stating:

> "Judgment vacated, and case remanremanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the the position taken by the Solicitor

> Attorney General in his brief for the United States filed April 4, 2003. Same case below, 299 F.3d 1252."

-- U.S. --, 123 S.Ct. 1928, 155 L.Ed.2d 847 (2003). Therefore, the panel of the Eleventh Circuit which decided Allen's appeal were incorrect in ruling that they lacked appellate jurisdiction to review the magistrate's order that disqualified Allen's attorney, Harrison Slaughter, on direct appeal.

Second, on the date upon which the panel of the Eleventh Circuit Court of Appeals decided Allen's direct appeal, an intra-circuit conflict existed within the Eleventh Circuit between the holdings set forth in **United States v. Renfro**, 620 F. 2d 497, 502 (5th Cir.), cert. denied, 449 U.S. 921 (1980), and **United States v. Warren**, 687 F.2d 347 (11th Cir. 1982).

The Eleventh Circuit in **Bonner v. City of Prichard, Alabama**, 661 F.2d 1206, 1207 (11th Cir. 1981), adopted **Renfro**, as binding circuit precedent. The Fifth Circuit held in **Renfro**, that appellate courts are without jurisdiction to hear appeals directly from federal magistrate

judges. Id. at 500. However, one-year later the Eleventh Circuit decided **United States v. Warren**, 687 F.2d 347 (11th Cir. 1982). The panel in **Warren**, held that appellate courts do have jurisdiction to review a magistrate's report and recommendations adopted by a district court even in the absence of objections and wrote:

> "The absence of objections to the magistrate's report and recommendations limits the scope of appellate review of factual findings to plain error or manifest injustice but does not limit review of legal conclusions. **Hardin v. Wainwright**, 678 F.2d 589, 591 (5th Cir. 1982); **Nettles v. Wainwright**, 677 F.2d 404, 405, 410 (5th Cir. 1982) (en banc)."

Id. **Warren**, 687 F.2d at 348. Consequently, this intra-circuit conflict has resulted in a panel incorrectly ruling it lacked appellate jurisdiction to review Allen's claim that the magistrate judge committed reversible error when he disqualified his attorney, Harrison Slaughter.

Moreover, both **Renfro** and **Warren** were decided prior to **Thomas v. Arn**, 474 U.S. 140, 88 L.Ed. 2d 435 (1985), wherein this Court held that a Federal Court of Appeals rule that failure to file timely objection

to a magistrate's report waives the right to appeal the district court's judgment adopting the reoprt did not violate either the Federal Magistrate Act or the Federal Constitution provided that "....it incorporated clear notice to the litigants and an opportunity to seek an extension of time foı filing objections." Id. 88 L.Ed. 2d at 448-449. However, the magistrate's disqualification order in Allen's case is inconsistant with the holdings in **Thomas v. Arn**, supra, because the order did not provide Allen with any notice that his failure to appeal the disqualification order to the district court would waive his right to appeal the order to the court of appeals. R-86.

Consequently, for all of the reasons stated above, Allen has adequately shown that the Eleventh Circuit Court of Appeals by mis-applying the law, and because of an intra-circuit conflict between **Renfro** and **Warren**, within the Eleventh Circuit, that a panel of the Eleventh Circuit, has denied Allen his constitutional rights to due process and equal protection of the law.

B. The district court applied the wrong standard in ruling upon Allen's claim that his conviction had been obtained in violation of his Sixth Amendment right to have counsel of choice present his defense.

This Court has intimated that obtaining a reversal of a conviction because of the denial of the defendant's right to a lawyer of his choice "does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." **Flanagan v. United States**, 465 U.S. 259, 79 L.Ed.2d 288, (1984). Hence, this Court in **Flanagan**, appears to have granted the right to one's choice of counsel, the same dignity as the right to self-representation pronounced in **Faretta v. California**, 422 U.S. 806, 45 L.Ed.2d 562, (1975).

The Eleventh Circuit in **Dorman v. Wainwright**, 798 F.2d 1358, 1370 (11th Cir. 1986), held that a defendant had been denied his right to effective assistance of counsel, because, appellate counsel had failed to raise the defendant's claim on

appeal that the defendant had been denied his right to self-representation. According to the opinion, the Eleventh Circuit held that the denial of the right to self-representation, did not require the defendant to show prejudice, regardless of the fairness of the trial, because, being denied the right to self-representation "cannot be harmless. It must, by definition, be prejudicial." Id. **Dorman**, 798 F. 2d at 1370.

Allen asserted throughout pp. 4-10, of his § 2255 motion that his attorney, A. Brian Phillips had been constitutionally ineffective, because, he failed to appeal the magistrate's order disqualifying his attorney, Harrison Slaughter, to the district court. This failure precluded the district court from holding a **Garcia** hearing under **United States v. Garcia**, 517 F. 2d. 272 (5th Cir. 1977), to determine if it were possible for Allen to waive any conflict of interest arising out of the governments's witness claiming that he overheard Allen make a specific statement in Harrison Slaughter's law office. Even worse, however, this failure served as the basis for the Eleventh Circuit Court

of Appeals to dismiss that portion of Allen's appeal which asserted that his conviction had been obtained in direct violation of his Sixth Amendment right to choice of counsel. Thus, Allen had showed that he had suffered prejudice. However, the district court in denying Allen's claim that his conviction had obtained in violation of his right to choice of counsel wrote:

> "...Petitioner has failed to demonstrate that there was any reasonable basis upon which counsel could have raised an objection to Magistrate Judge Jones' order on the motion for disqualification. The Court finds that counsels' conduct with regard to these issues was reasonable and that Petitioner has not shown prejudice.

(See Appendix B at App. 20). Nonetheless, based upon the language quoted in this petition from **Flanagan**, supra, strongly suggesting, denial of one's choice of counsel, constitutes a structural error, that is reversible per se. See **Neder v. United States**, 527 U.S. 1, 144 L.Ed.2d 35 (1999). The district court applied the wrong standard in ruling upon Allen's claim that he was denied his right under the Sixth Amendment to choice of counsel.

2.

The district court's ruling and appeal court's ruling that Allen had failed to make a substantial showing of the denial of a constitutional right are inconsistant with the standards to be applied in reviewing applications for certificates of appelability pronounced by the Court in Slack v. McDaniel, 529 U.S. 523, 146 L.Ed.2d 542, (2002), and Miller-El. v. Cockrell, 537 U.S. 322, 154 L.Ed.2d 931 (2003).

This Court held in **Slack v. McDaniel**, 529 U.S. 423 (2002), that "[w]here a district court has rejected [a petitioner's] constitutional claims on the merits..... [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Furthermore, this Court also held "[w]hen the district court denied a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim a COA should issuse when the prisoner shows, at least, that jurists of reason would find

it debatable whether the petition states a valid claim of the denial of a constitutional right, and jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. And this Court's opinion in **Miller-El v. Cockrell**, 537 U.S. 322, makes it very clear that whether to grant a COA is intended to be a preliminary inquiry, undertaken before full consideration of the Petitioner's claims. Id. 123 S.Ct. at 1039.

It is a fundamental principle that "under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.'" **Rose v. Lundy**, 455 U.S. 509, 71 L.Ed.2d 379 (1982)(quoting **Ex Parte Royall**, 117 U.S. 241, 29 L.Ed. 868 (1886). It is also a well-established principle that the Fifth Amendment's Due Clause encompasses equal protection principles. **Matthews v. DeCastro**, 429 U.S. 286, 22 L.Ed.2d 281 (1969).

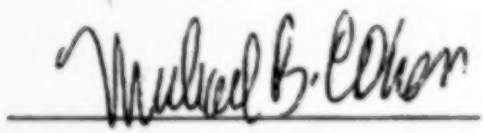
Allen has adequately demonstrated in this petition that a jurisdictional

rule employed by the Eleventh Circuit which no longer has support from this Court has resulted in a panel of the Eleventh Circuit dismissing a portion of Allen's appeal. Likewise, Allen has adequately shown this Court, an intra-circuit conflict within the Eleventh Circuit has caused a panel of the Eleventh Circuit to rule that it lacked jurisdiction to review Allen's Sixth Amendment claim on direct appeal. Consequently, Allen has been denied his constitutional rights under the Fifth Amendment to due process and equal protection of the law predicated upon the Eleventh Circuit dismissing the portion of Allen's appeal which asserted that his conviction had been obtained in violation of his right under the Sixth Amendment to have choice of counsel to present his defense. Thus, Allen has shown the denial of a constituional right. Accordingly, jurists of reason would find the rulings by the district court and the Eleventh Circuit upon Allen's habeas petition to be debatable or wrong.

CONCLUSION

Based upon the foregoing petition, it is respectfully requested that this Court grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit, and that a GVR order be entered allowing Allen to appeal his Sixth Amendment claim that his conviction had been obtained in violation of his right to choice of counsel.

Respectfully submitted,



Michael B. Cohen,
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August 17, 2005

APPX. 1
APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

U.S. FOR THE ELEVENTH CIRCUIT

No.02-11918
Non-Argument Calendar

D.C. Docket No. 00-00028-CRT-OCR-10

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TERRY WAYNE ALLEN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(November 26, 2002)

Before DUBINA, MARCUS and FAY, Circuit Judges.

PER CURIAM:

APPX. 2

Terry Wayne Allen, a federal prisoner, appeals his conviction and sentence for conspiracy to distribute marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(l). On appeal, Allen raises five issues. He alleges that the magistrate judge erroneously disqualified his first retained counsel. Allen also maintains that the superceding indictment did not relate back to the original indictment and, thus, was barred by the statute of limitations. Next, Allen contends that the evidence presented at trial was insufficient to sustain the jury's forfeiture verdict. Fourth, Allen asserts that the forfeiture verdict was a nullity in light of his contention that the superceding indictment was untimely. Finally, Allen argues that a material variance existed between the indictment and the government's evidence at trial. For the reasons set forth more fully below, we affirm Allen's conviction and sentence.

Allen was indicted on July 19, 2000, for conspiracy to distribute more than 100 kilograms of marijuana, in violation of §§ 846 and 841(a)(l). According to the indictment. Allen participated in the conspiracy from 1989 through August 29, 1995. The indictment's forfeiture provision notified Allen that the government sought to forfeit his interest in property that was used to facilitate the offense, including, but not limited to, "[r]eal property, its buildings, appurtenances and improvements thereon, located at 29323 E. State Road 44, Eustis, Lake County, Florida."

On January 17, 2001, the grand jury returned a superceding indictment, reasserting that, Allen engaged in a marijuana conspiracy from 1989 through August 29, 1995, and newly alleging that the conspiracy involved 1,000 kilograms or more of marijuana. The forfeiture provision reiterated the language from the original indictment and added that the government sought to forfeit $600,000 in narcotics proceeds and Allen's rights under a Prior to trial, the government moved to disqualify Allen's retained counsel,

Harrison T. Slaughter, Jr., alleging that Slaughter labored under a conflict of interest because it was likely, that he would be called to testify at trial as a defense witness. The government alleged, in the alternative, that Slaughter must be disqualified because he had first-hand knowledge of events presented at trial and, therefore, could assume the role of an unsworn witness. After conducting an evidentiary hearing, the magistrate judge entered an order disqualifying Slaughter. Allen retained another attorney.

During trial, co-conspirator Michael Baxley testified that he began working for Allen in 1989 in Allen's land clearing business. In that same year, Baxley also became involved in Allen's marijuana business and started to receive "small amounts" of marijuana from Allen. In the early 1990's, Allen supplied Baxley with five and ten pound quantities for Baxley to distribute, and they shared the proceeds. Between 1990 and 1993, Baxley and Allen received marijuana shipments from Mexico and Texas, delivered by Rolando and Poncho Siller. They retrieved 50 to 80 pounds of marijuana from the Sillers on several occasions. In 1992 and 1993, Allen supplied Baxley with 15 to 20 pounds of marijuana per week. During this period. Allen supplied marijuana to individuals named Norman Hickman, Michael Stephens, Bobby Sherman, Keimy, and Digum Dan. In early 1994, the Sillers provided Baxley and Allen biweekly shipments of 475 to 500 pounds of marijuana. In late 1994, the Sillers stopped sending marijuana, and the partnership between Baxley and Allen began to "break away." Allen and Baxley continued to receive marijuana from people within the Sillers' organization, Allen using co-conspirator Luis Delgado as his source, and Baxley using an individual named Chuy. From late 1994 into 1995, Allen supplied Baxley with 10 to 20 pounds of marijuana on several occasions. Baxley further testified that, during the period alleged in the indictment, he witnessed Allen (1) transport quantities of marijuana to his State Road 44

residence to prepare it for delivery on several occasions; (2) store between $80,000 and $100,000 in drug proceeds at that residence; and (3) store marijuana in a swamp buggy on the property on several occasions. On one occasion. Allen stored from 50 to 100 pounds of marijuana in the shed behind the house on the State Road 44 property. Also, a tractor-trailer delivered marijuana to Allen's State Road 44 residence on one occasion. During Baxley's testimony, the jury listened to a telephone conversation occurring on August 15,1995, during which Allen agreed to sell Baxley between 7 and 15 pounds of marijuana for distribution to one of Baxley's customers. Baxley did not recall if Allen in fact ended up supplying him with the marijuana. Also, on August 29, Allen agreed to sell Baxley ten pounds of marijuana. The jury also listened to September 1995 conversations in which Baxley and Allen discussed how the police caught them, and Allen stated that he may need a witness to state that he did not smoke marijuana.

Co-conspirator Michael Stephens testified that he began cultivating marijuana plants with Baxley and Allen in 1992. Stephens distributed between 50 and 130 pounds of marijuana for Baxley and Allen from 1992 through 1993. Co-conspirator Norman Hickman testified that he began purchasing marijuana from Allen in 1994. Allen supplied Hickman with approximately 20 pounds of marijuana every week or two. Hickman normally received the marijuana at Allen's State Road 44 residence, and he saw Baxley's supplier, Chuy, at the residence on two occasions. On one of those occasions, Hickman received 50 pounds of marijuana from Chuy. On several occasions, Hickman delivered approximately $20,000 in drug proceeds to Allen's State Road 44 residence. On one occasion, Allen and his wife counted $50,000 in drug proceeds on the kitchen table. Hickman stated that he received marijuana from Baxley on one occasion. Hickman estimated that he distributed between 300 and 400 pounds of marijuana from January 1994 through October 1994.

Co-conspirator Luis Delgado testified that, on two occasions in 1993 or 1994, he picked up money from Allen at the State Road 44 residence and delivered it to Carlos Siller. In 1994 or 1995, Delgado delivered 100 pounds of marijuana to Allen at the State Road 44 residence. In August 1995, four or five days before Allen's arrest, Delgado delivered an additional 50 pounds of marijuana to Allen at his State Road 44 residence. At that time. Allen owed Delgado $60,000. A few days after Allen was released on bond, Delgado visited Allen at his residence to collect the money.

At the conclusion of the government's case, Allen moved for a judgment of acquittal, arguing that (1) the evidence established multiple conspiracies; and (2) the superceding indictment was time-barred. The district court denied the motion. Thereafter, the jury found Allen guilty as charged of conspiracy to distribute marijuana and, in a separate verdict, found that Allen should forfeit $220,000 in drug proceeds and his interest in the State Road 44 property, including all buildings and appurtenances thereon. The jury clarified that the State Road 44 property should be forfeited because it facilitated the offense.

Allen filed a "Renewed Motion for Judgment of Acquittal or in the Alternative for a New Trial," reiterating that the evidence established multiple conspiracies, and newly alleging that the district court's disqualification of Slaughter was erroneous. Allen also argued for the first time that the superceding indictment was time-barred in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The district court denied the motion.

The presentence investigation report recommended a base offense level of 32, pursuant to U.S.S.G. § 2Dl.l(a)(3), because-the offense involved between 1,000 and 3,000 kilograms of marijuana. The probation officer also noted that Allen faced a maximum possible sentence of life

imprisonment, pursuant to § 841(b)(l)(A), based on his 1988 convictions for possession and cultivation of marijuana. Finally, in determining Allen's net worth, the probation officer found that Allen's equity in the State Road 44 residence and 23-acre homesite was $260,000. The district court sentenced Allen, in accordance with § 841(b)(l)(A), to 20 years' imprisonment and 10 years' supervised release. The court also ordered that Allen forfeit to the United States $220,000 in drug proceeds and the State Road 44 property.

Allen argues on appeal that the magistrate judge erroneously disqualified his first retained counsel. "A [district court] judge may designate a magistrate judge to hear and determine any pre-trial matter pending before the court .. .and may reconsider any pretrial matter ... where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(l)(A). It is well-established that appeals from a magistrate's, pre-trial ruling must be to the district court. See United States v. Brown. 299 F.3d 1252, 1260 (11th Cir. 2002) (stating that the rule is jurisdictional and not subject to equitable exceptions); United States v. Renfro. 620 F.2d 497, 500 (5th Cir.), cert. denied. 449 U.S. 921 (1980). The defendant in Renfro filed a pre-trial discovery motion, which the magistrate denied. Renfro. 620 F.2d at 499-500. The defendant failed to appeal the magistrate's order to the district court and first raised the possibility that the magistrate erred in a post-trial motion. Id. at 500. On appeal, we concluded that we lacked jurisdiction to review the magistrate's order because, "[i]n essence then, defendant is now appealing a magistrate's decision directly to
this Court.". Id. Significantly, we stated that, although the defendant appealed the magistrate's ruling to the district court, his failure to do so until after trial deprived the trial judge of his ability to effectively review the magistrate's holding. Id.

This case is indistinguishable from Renfro. Similar to

challenged the magistrate's order disqualifying his retained counsel in a post-trial motion. Also, similar to the evidentiary motion at issue in Renfro, the motion to disqualify Allen's retained counsel was a pre-trial motion, the adjudication of which was necessary to proceed to trial. Thus, Allen's delay in appealing the magistrate's ruling deprived the trial judge of his ability to effectively review the magistrate's holding. By analogy to this Court's holding in Renfro. Allen is now appealing the magistrate's decision directly to this Court, and, accordingly, we must dismiss this portion of Allen's appeal for lack of jurisdiction.

Next, Allen argues that he was entitled to .a judgment of acquittal because the superceding indictment was barred by the applicable statute of limitations. Allen maintains that the superceding indictment was filed more than five years after the conspiracy ended and did not relate back to the original indictment because it materially broadened the original charge. Specifically, Allen contends that the superceding indictment (1) increased the alleged amount of marijuana from 100 to 1,000 kilograms, thus increasing the maximum and mandatory minimum penalties Allen faced; and (2) sought forfeiture of an additional $600,000 in narcotics proceeds and proceeds from the lease agreement between Allen and Nextel. Finally, Allen asserts that Apprendi supports his statute of limitations argument because the superceding indictment increased the maximum penalty for the offense from 40 years' imprisonment to life.[1]

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[1] The government's contention that Allen waived his statute of limitations defense by failing to raise it prior to trial is without merit. See United States v. Nanar, 283 F.3d 1306, 1308 (11th Cir.), cert. denied, (U.S. Oct. 7, 2002) (No. 01-1816).

We review de novo a district court's denial of a defendant's motion for a judgment of acquittal. United States v. Pendergraft 297 F.3d 1198,1204 (11th Cir. 2002). We review for abuse of discretion a district court's denial of a defendant's motion for a new trial. Id. "A superceding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superceding indictment does not broaden or substantially amend the original charges." United States v. Ratcliff, 245 F.3d 1246, 1253 (11th Cir. 2001). The crucial inquiry is "whether approximately the same facts were used as the basis of both indictments." Id. at 1253 (explaining that, "[i]f the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him").

Allen concedes that the original indictment was timely filed. Thus, our determination hinges solely on whether the superceding indictment related back to the original indictment. The superceding indictment did not allege additional ventures or participants, and its allegations regarding the nature and duration of the conspiracy were identical to those contained in the original indictment. Although the superceding indictment increased the amount of drugs from "more than 100 kilograms" to "1,000 kilograms or more," the same facts were used as the basis of both indictments; thus. Allen does not demonstrate that the increase in the alleged quantity of drugs, alone, broadened the charges against him. See Ratcliff, 245 F.3d at 1253. Thus, we conclude that Allen was not entitled to a judgment of acquittal, or a new trial, based on the fact that the superceding indictment increased the amount of marijuana from 100 to 1,000 kilograms.

Additionally, Allen's reliance on Apprendi is misplaced. The Supreme Court held in Apprendi that, "[o]ther

than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Apprendi addressed the constitutionality of a statutory sentencing scheme, and it clearly is implicated when a defendant is sentenced beyond the statutory maximum penalty for his offense based on a fact that was not proved beyond a reasonable doubt. See id. We have held, however, that "Apprendi has *no effect* in cases in which a defendant's actual sentence falls *within the range* prescribed by the statute for the crime of conviction." United States v. Sanchez, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc) (emphasis in original), cert.denied. 122 S.Ct 1327 (2002). Thus, Allen is not entitled to relief under Apprendi because his 20-year sentence falls within the 40-year maximum penalty for his offense.

Finally, Allen's assertion that the superceding indictment subjected him to increased maximum and mandatory minimum penalties does not entitle him to relief because "[t]he potential for imposition of a greater penalty under a superceding indictment does not render such charges broader than those in the original indictment." United States v. Elliott, 849 F.2d 554, 561 (11th Cir. 1988). Similarly, the fact that the superceding indictment in this case expanded the forfeiture provision is of no consequence because criminal forfeiture is merely part of a defendant's sentence and, thus, cannot broaden the scope of a charged crime. See Libretti v. United States, 516 U.S. 29, 40-41, 116 S.Ct. 356, 363-64, 133 L.Ed.2d 271 (1995) (holding that criminal forfeiture is "punishment," not part of the substantive offense).

Next, Allen argues that the evidence presented at trial was insufficient to sustain the jury's forfeiture verdict because it did not establish a factual nexus between the offense and the State Road 44 property. Allen alleges that his home was not acquired with drug proceeds, and testimony from

witnesses who delivered money and marijuana to his property. (1) did not show that the deliveries were made while the conspiracy was ongoing, and (2) was inconsistent with testimony showing that no shed was located on the property.[2] Finally, Allen argues that the forfeiture of the State Road 44 property has Eighth Amendment implications because the value of the property was disproportionate to the gravity of the offense.

We review de novo whether the evidence was sufficient to sustain a defendant's conviction, viewing the evidence arid all reasonable inferences in the light most favorable to the government. United States v. Goldin Indus. Inc. 219 F.3dl271, 1278 (11th Cir.), cert. denied. 531 U.S. 1015 (2000). Any person convicted of a drug felony shall forfeit "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate, the commission of, such violation." 21 U.S.C. § 853(a)(2); United States v. Dieter. 198F.3d 1284, 1289 (11th Cir. 1999) (holding that the government must prove the elements of criminal forfeiture under § 853(a)(2) by a preponderance of the evidence), cert. denied. 531 U.S. 828 (2000). Criminal forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense. United States v. Bajakajian. 524 U.S. 321, 334, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314 (1998). However, if the value of the forfeited property is within the range of fines prescribed by Congress for the offense, "a strong presumption arises that the forfeiture is constitutional." United States v. 817 N.E. 29th Drive. Wilton Manors. Fla., 175 F.3d 1304, 1309 (11th Cir. 1999), cert. denied. 528 U.S. 1083 (2000).

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[2] Allen and Allen's wife testified that there was a large barn in the back of the property, but that it was unlikely that people would refer to the barn as a "shed." Allen's contention, that his and his wife's classification of the structure as a "barn" refutes Baxley's testimony that Allen stored marijuana in a "shed" on the State Road 44 property, is frivolous.

Even assuming the State Road 44 property was not acquired through drug proceeds, the government presented overwhelming evidence showing that it was used to facilitate the drug conspiracy. As discussed above, Baxley testified that, during the period alleged in the indictment, from 1989 through August 29, 1995, Allen (1) transported quantities of marijuana to the State Road 44 property to prepare it for delivery on several occasions, (2) stored between $80,000 and $100,000 in drug proceeds on the property, and (3) stored marijuana in a swamp buggy on the property on several occasions. On one occasion, Allen stored from 50 to 100 pounds of marijuana in the shed on the State Road 44 property. Also, according to Baxley, a tractor-trailer delivered marijuana to the State Road 44 property on one occasion. Hickman testified that, during the period alleged in the indictment, he normally received marijuana from Allen at his State Road 44 residence, and he saw Baxley's supplier, Chuy, at the house on two occasions. Also, on several occasions, Hickman delivered approximately $20,000 in drug proceeds to the State Road 44 residence. On one such occasion. Allen and his wife counted $50,000 in drug proceeds on the kitchen table. Finally, Delgado testified that, during the period alleged in the indictment, he (1) picked up drug money from Allen at his State Road 44 residence on two occasions, (2) delivered 100 pounds of marijuana to Allen at that residence on one occasion, and (3) delivered 50 pounds of marijuana to Allen at that residence on one occasion.Viewing the evidence in the light most favorable to the government, a reasonable jury could have found by a preponderance of the evidence that Allen used the State Road 44 property to facilitate the drug conspiracy.

Additionally, Allen is not entitled to relief on his contention that the forfeiture of his property was excessive. As noted above, the probation officer valued Allen's equity in his State Road 44 residence and 23-acre homesite at

$260,000. Because the value of the forfeited property was well within the range of fines prescribed by Congress for the offense, i.e., $4 million, we should presume that the forfeiture was constitutional. See 21 U.S.C. § 841(b)(1)(A) (providing a $4 million maximum fine for an offense involving at least 1,000 kilograms of marijuana); 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d at 1309. Also, in light of the evidence showing that Allen's offense involved thousands of pounds of marijuana, and hundreds of thousands of dollars in illegal drug proceeds, he cannot overcome the presumption that the forfeiture was not disproportionate to the gravity of the offense.

Next, Allen alleges for the first time on appeal that the forfeiture verdict was a nullity because the superceding indictment that gave rise to the forfeiture action was not timely filed. We need not address whether the forfeiture verdict was a nullity because this issue is moot. As noted above, Allen's contention that the superceding indictment was untimely is without merit.

Finally, Allen argues that he was entitled to a judgment of acquittal because a material variance existed between the indictment and the evidence presented at trial. Allen maintains that the evidence established at least four conspiracies to traffic in marijuana, rather than one conspiracy that continued through August 1995. Allen further contends that he was substantially prejudiced by this variance because it permitted the government to bootstrap his unrelated August 29, 1995, arrest with a small amount of marijuana to prove that the alleged conspiracy continued until that date.

A material variance between an indictment and the government's proof at trial occurs if the government proves multiple conspiracies under an indictment alleging only a single conspiracy. United States v. Aired, 144 F.3d 1405, 1414 (11th Cir. 1998). Whether the evidence established a single conspiracy is an issue of fact to be determined by the jury,

and "the arguable existence of multiple conspiracies does not constitute a material variance from the indictment if, viewing the evidence in the light most favorable to the government, a reasonable trier of fact could have found that a single conspiracy existed beyond a reasonable doubt." Id. In determining whether a reasonable juror could have found a single conspiracy, we consider (1) whether a common goal existed, (2) the nature of the underlying scheme, and (3) the overlap of participants. Id.

Here, while some of the co-conspirators, such as the Sillers, Stephens, Delgado, and Hickman, moved in and out of the conspiracy, Allen's role as a major distributor, and Baxley's close involvement with Allen's trafficking activities, remained constant throughout the conspiracy's duration. This, alone, is sufficient to prove that a single conspiracy existed. See United States v. Taylor, 17 F.3d 333, 337 (11th Cir.) (finding sufficient evidence of a single conspiracy where all three transactions had "the common hub of [one person] at their core"), cert. denied, 513 U.S. 950 (1994). In addition to showing that Allen was the "common hub" for several transactions, the government demonstrated a considerable overlap of participants. Significantly, (1) Baxley and Allen both received marijuana from the Sillers; (2) Stephen and Hickman received marijuana from both Baxley and Allen; and (3) the marijuana that Allen supplied to Baxley was obtained from the Sillers and, subsequently, Delgado.

Finally, in addition to showing that Allen was the "common hub" in a multi-transactional scheme to distribute marijuana for profit, the government's evidence was sufficient to prove that Allen and Baxley remained co-conspirators from 1989 through August 29, 1995. Allen contends that he "terminated his involvement in marijuana dealing with Baxley" prior to 1995, and his August 29, 1995, arrest was not linked in any way to the alleged conspiracy. However, Baxley testified at trial that Allen continued to

supply him with 10 to 20 pound quantities of marijuana after they had "split to some extent" in 1995. Viewing Baxley's testimony in the light most favorable to the government, a reasonable juror could have concluded that Allen's attempted delivery often pounds of marijuana to Baxley on August 29, 1995, the day of Allen's arrest, was made in furtherance of the conspiracy. Allen has failed to demonstrate that a material variance existed between the indictment and the government's evidence at trial.

For the foregoing reasons, we conclude that we lack jurisdiction to review the magistrate's order disqualifying Allen's retained counsel. We further conclude that (1) the superceding indictment related back to the original indictment and, thus, was timely filed; and (2) therefore, Allen's contention that the forfeiture verdict was a nullity is moot. We also conclude that the evidence presented at trial was sufficient to sustain the jury's forfeiture verdict. .Finally, we conclude that a reasonable juror could have found that Allen participated in a single conspiracy from 1989 through August 29, 1995. Thus, Allen's contention that a material variance existed between the indictment and the government's evidence at trial is without merit.

AFFIRMED.

APPX. 15
APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TERRY ALLEN,

Petitioner,

v. CASE NO. 6:03-cv-1803-Orl-28KRS
(5:00-crt-28-Orl-28KRS)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This case involves an amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 27). The Government filed a response (Doc. No. 29), a supplemental response (Doc. No. 32), and A second supplemental response (Doc. No. 34) to the amended section 2255 motion. Petitioner then filed a reply (Doc. No. 36) to the responses.

Petitioner alleges essentially two claims for relief in his motion: first, that he received ineffective assistance of counsel; and second, that he "was actually innocent of his conviction77 because there was insufficient evidence that he conspired to possess the amount of marijuana alleged in the indictment.

Procedural History

Petitioner was charged by indictment with conspiracy to distribute over 100 kilograms of marijuana (Criminal Case No. 5:00-crt-28-Ocr-28KRS, Doc. No. 1, filed July 19, 2000)[1]. On August 4, 2000, Mr. Clyde A. Taylor, Jr. entered a notice of appearance on behalf of Petitioner (Criminal Case Doc. No. 12). On January 17, 2001, Petitioner was charged by superseding indictment with conspiracy to distribute between 100 kilograms and 1,000 kilograms of marijuana (Criminal Case Doc. No. 37). On February 12, 2001, Harrison T. Slaughter, Jr. entered a notice of appearance on behalf of Petitioner (Criminal Case Doc. No. 47). The Government then filed a motion to disqualify Mr. Slaughter as Petitioner's counsel on the basis of a conflict of interest (Criminal Case Doc. No. 56, filed March 16, 2001). United States Magistrate Judge Gary R. Jones held a hearing on the motion and entered an order disqualifying Mr. Slaughter and his law firm from representing Petitioner (Criminal Case Doc. No. 86, filed June 22, 2001). On June 26, 2001, A. Brian Phillips entered a notice of appearance on behalf of Petitioner (Criminal Case Doc. No. 87).

The case proceeded to a jury trial, and Petitioner was found guilty as charged in the superseding indictment (Criminal Case Doc. No. 120, filed November 9, 2001). The Court adjudicated Petitioner guilty of conspiracy to distribute marijuana and sentenced him to imprisonment for a term of 240 months (Criminal Case No. 154, filed April 2, 2002).[2] Petitioner filed a direct appeal with the Eleventh Circuit Court of Appeals, which entered a written, unpublished

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[1]Hereinafter Criminal Case No. 5:00-crt-28-Ocr-28KRS will be referred to as "Criminal Case."

[2]The judgment was amended on two occasions to correct a clerical error and the amount of the special assessment (Criminal Case No. 5:00-crt-28-Ocr-28KRS, Doc. Nos. 178 and 180).

opinion affirming the conviction and sentence. *See* Criminal Case Doc. No. 201, filed February 6, 2003). Because Senior United States District Judge William Terrell Hodges had previously recused himself from the underlying criminal case, this case was reassigned to the undersigned.

Claim One

Petitioner avers that he received ineffective assistance of counsel because of the following: 1) Mr. Phillips failed to challenge the order disqualifying Mr. Slaughter; 2) Mr. Phillips failed to disclose a "significant conflict of interest"; 3) Mr. Slaughter and Mr. Taylor failed to object to Magistrate Judge Jones' order disqualifying Mr. Slaughter and his law firm; and 4) trial counsel and appellate counsel failed to "challenge the fact that petitioner was indicted for a new crime outside the statute of limitation."

1. *Legal Standard*

The Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984)/ established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the Strickland test requires that the defendant demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The second prong of the Strickland test requires the defendant to show that the deficient performance prejudiced the defense. Id. at 687.[3] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. Id. at 689-90.

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[3]In Williams v. Taylor, 529 U.S. 362,391 (2000), the Supreme Court discussed that to establish prejudice the petitioner must demonstrate that "there is a reasonable probability that but for

2. *Issues One and Three*

In issue one Petitioner argues that Mr. Phillips failed to file an objection to Magistrate Judge Jones' order disqualifying Mr. Slaughter. In issue three Petitioner contends that Mr. Slaughter and Mr. Taylor failed to file an objection to Magistrate Judge Jones' order disqualifying Mr. Slaughter. Petitioner claims that he was willing to waive any potential conflict of interest on the part of Mr. Slaughter.

On May 29, 2001, Magistrate Judge Jones held an evidentiary hearing on the Government's motion to disqualify Mr. Slaughter. The Government's request to disqualify Mr. Slaughter concerned an alleged statement made by Petitioner to Michael Baxley, who was a co-conspirator and alleged partner of Petitioner in distributing marijuana, in the presence of Mr. Slaughter at his law office. The Government alleged that Mr. Slaughter should be disqualified because Petitioner could have been required to call Mr. Slaughter as a witness to refute the testimony of Mr. Baxley. At the evidentiary hearing, the Government presented the testimony of Mr. Baxley, and both sides argued extensively with regard to the disqualification issue.

On June 22, 2001, Magistrate Judge Jones entered a written order granting the Government's motion for

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counsel's unprofessional errors, the result of die proceeding would have different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Quotation omitted) (citation omitted). However, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Id.

disqualification.[4] Magistrate Judge Jones concluded that there was a serious potential for conflict, that the conflict was not waivable, and that disqualification was the only measure to be implemented in order of protect the integrity and fairness of the trial.

At the evidentiary hearing, Mr. Baxley testified that Petitioner, in Mr. Baxley's presence, told Mr. Slaughter that they were "partners." (Transcript of Evidentiary Hearing at 9-10, 22.) Clearly, Mr. Baxley was to be one of the primary witnesses for the Government at trial. In order for Petitioner to refute Mr. Baxley's statements, it was likely he would need to call Mr. Slaughter as a witness. It is readily apparent that a conflict of interest arose in this case. See United States v. Locnscio, 6 F.3d 924,933 (2nd Cir. 1993), cert. denied, 511 U.S. 1070 (1994) (holding that "[a]n attorney acts as an unsworn witness when his relationship to Ms client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation.... Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question."). In addition, this conflict of interest could not be waived by Petitioner. See id. at 934 (finding that "|w]hen an attorney is an unsworn witness, however, the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the fact finding process is impaired. Waiver by the defendant is ineffective in curing the impropriety in such situations, since he is not the party

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"Magistrate Judge Jones orally granted the motion at the conclusion of a hearing on the Government's motion to revoke Petitioner's bond, which was held on June 11, 2001.

prejudiced."). Under the circumstances. Petitioner has failed to demonstrate that there was any reasonable basis upon which counsel could have raised an objection to Magistrate Judge Jones' order on the motion for disqualification. The Court finds that counsels' conduct with regard to these issues was reasonable and that Petitioner has not shown prejudice.

3. *Issue Two*

Petitioner avers that Mr. Phillips failed to disclose a "significant conflict of interest." According to Petitioner, Greg Miller, the law partner of Mr. Phillips, was a former Assistant United States Attorney and had been involved in the efforts to indict Petitioner on federal criminal charges.

The right to effective assistance of counsel encompasses the right to representation free from actual conflict with defense counsel. Lightbourne v. Dugger, 829 F.2d 1012,1022 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (footnote omitted). Therefore, to establish a Sixth Amendment violation, the petitioner must demonstrate both that an actual conflict of interest existed and that such conflict adversely affected the adequacy of his (or her) representation. Smith v. White, 815 F.2d 1401,1404 (11th Cir.), cert. denied, 484 U.S. 863 (1987); see also LoConte v. Dugger, 847 F.2d 745,755 (11th Cir.), cert. denied, 488 U.S. 958 (1988) ("an actual conflict of interest does not carry a per se presumption of prejudice, but a limited presumption. The defendant must establish two elements: first, an actual conflict of interest and, second, that the conflict of interest 'adversely affected' [her] counsel's representation.... [T]he limited presumption of prejudice implied by a conflict of

interest requires only a showing of an adverse effect."). The Eleventh Circuit Court of Appeals has stated as follows:

> [P]etitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party. This requires petitioner to make a factual showing of inconsistent interests and demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. Absent such a demonstration, the conflict remains hypothetical and cannot form a basis for relief.

Porter v. Singletary, 14 F.3d 554, 560-61 (11th dr.), cert. denied, 513 U.S. 1009 (1994) (quotation omitted) (citations omitted).

Petitioner has failed to demonstrate that an actual conflict of interest existed in this case. "Although the possibilities for actual conflicts are very real when attorneys 'switch sides' in a subsequent criminal case involving the same defendant, such conflicts do not automatically occur." Maiden v. Bunnell, 35 F.3d 477, 480-81 (9th Cir. 1994). There is no indication that Mr. Miller was involved in the case or that any confidential information he might have possessed would have worked to Petitioner's disadvantage. Any conflict is speculative at best.

Moreover, in the event that an actual conflict of interest did exist, the Court determines that Petitioner has not met the "adverse affect" (prejudice) prong; i.e., Petitioner has not shown that such a conflict of interest adversely affected

the adequacy of his representation. In sum, Petitioner has not met his burden of pointing to some aspect of Mr. Phillips' trial performance that was a likely adverse effect stemming from the alleged conflict of interest. Therefore, this issue must fail.

4. *Issue Four*

Petitioner asserts that trial counsel and appellate counsel failed to "challenge the fact that petitioner was indicted for a new crime outside the statute of limitation." According to Petitioner,"[o]n January 17,2001, a superceding indictment was returned well after the five year statute of limitation had expired."

The record reflects that Petitioner's appellate counsel thoroughly argued this matter on direct appeal. In fact, the Eleventh Circuit discussed this matter in detail in its written opinion and found that it was without merit. Petitioners appellate counsel's discussion of this matter was comprehensive, thorough, and well-argued. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. Cf. Thomas v. Scully, 854 F. Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by counsel clearly showed the thoroughness of counsel's work). The Court finds that appellate counsel's performance was not deficient and that Petitioner has not demonstrated prejudice.

The record also reflects that, at trial. Petitioner's trial counsel successfully argued that the statute of limitations defense should be incorporated into the jury instructions. See Doc. No. 146 at 107-11. Consequently, the Court finds that Petitioner has not demonstrated that trial counsel acted unreasonably with regard to this matter or that he sustained prejudice.

Claim Two

Petitioner avers that there was insufficient evidence that he "conspired to possess 1000 kilograms of marijuana".

"Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding." Mills v. United States, 36 F.3d 1052,1055 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995); see also Cross v. United States, 893 F.2d 1287, 1289 (11th Cir.) ("In a section 2255 federal habeas motion, a movant may not raise claims that were not presented on direct appeal unless he can show cause excusing his failure to raise the issues previously and actual prejudice resulting from the errors."), cert. denied, 498 U.S. 849 (1990); Greene v. United States, 880 F.2d 1299,1305 (11th Cir. 1989) ("In general, a defendant must assert an available challenge to a sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding."), cert. denied, 494 U.S. 1018 (1990). "When a defendant fails to pursue an available claim on direct appeal, it will not be considered in a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the alleged error." Mills, 36 F.3d at 1055; see also Greene, 880 F.2d at 1305 ("A defendant can avoid this procedural bar only by showing both cause for the failure to raise the claim on direct appeal and actual prejudice arising from that failure."). Alternatively, under the fundamental miscarriage of justice exception, when a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant relief in the absence of a showing of cause for the procedural default. Mills, 36 F.3d at 1055.

In the present case. Petitioner has not alleged or otherwise demonstrated cause or prejudice with regard to his failure to raise this claim on direct appeal. Likewise, Petitioner has neither alleged nor shown the applicability of the fundamental miscarriage of justice exception. The entire

record has been reviewed, and the Court concludes that Petitioner is unable to satisfy either of die exceptions to the procedural default bar. Therefore, Petitioner's failure to raise this claim on direct appeal constitutes a waiver and bars him from raising claim two in the instant proceeding.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 27, filed March 4, 2004) filed by Terry Allen is **DENIED**, and this case is **DISMISSED** with prejudice.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of the Court is directed to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Criminal Case Doc. No. 317, filed March 4, 2004) pending in case number 5:00-cr-28-Oc-28KRS.

DONE AND ORDERED in Chambers at Orlando, Florida this 20 day of October, 2004.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

Copies to:
psk 10/18
Terry Allen
Counsel of Record

APPX. 25
APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TERRY ALLEN,
Petitioner,

-vs- Case No. 6:03-cv-1803-Orl-28KRS
(Criminal Case No.: 5:00-cr-28-Oc-28KRS)

UNITED STATES OF AMERICA,
Respondent.

ORDER

Tills case is before the Court on the following motion:

MOTION:	**PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY (Doc. No. 42)**
FILED:	**January 10,2005**

THEREON it is ORDERED that the motion is DENIED.

Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 12 day of January, 2005.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

APPX. 26
APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.05-10222-G

TERRY ALLEN,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA,

Respondent-Appellee

Appeal from the United States District Court for the Middle District of Florida .

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

/s/ Joel F. Dubina

UNITED STATES CIRCUIT JUDGE

APPX. 27
APPENDIX E

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-10222-G

TERRY ALLEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before TJOFLAT and DUBINA, Circuit Judges.

BY THE COURT:

Appellant has filed a "Motion Asking That A Three Judge Panel Review A One Judge Order Denying Appellant's Application for a Certificate of Appealability," which is construed as a motion for reconsideration of this Court's order dated March 11, 2005, denying his motion for a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has

failed to make the requisite showing. See 28 U.S.C. § 2253 (c)(2);' Slack v. McDaniel, 529 U.S. 473. 478, 120S.Ct. 1595, 1600-01, 146 L.Ed,2d 542 (2000); see also Strickland v. Washington, 466 U.S. 668, 687,104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984); United States v. Fradv, 456 U.S. 152, 167-68, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982); Nyland v. Moore, 216 F.3d 1264,1265 (11th Cir. 2000) (holding that this Court will not consider issues raised for the first time on appeal).